NO. 81-26

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Counter-Statement of Questions Presented

1. Does a board of education act within constitutional parameters when it denies the accrual of tenure to an English teacher based on a factual determination that for entire class periods during a two and three day time span her entire teaching performance comprised no other activity except a physical presence in class during which time both she as a teacher and her pupils as students of English were solely involved in reading to themselves which the Board of Education concluded in the exercise of its broad discretion constituted an abdication of any bona fide teaching effort or at the very least an unimpressive teaching performance undeserving of a tenured appointment; or, is it conceivable that such a determination to deny tenure under such circumstances is a violation of academic freedom, freedom of speech or any possible constitutional right of the individual so involved.

2. Is the insistence of the petitioner as a nontenured employee that the activity described as "silent reading" is a viable educational methodology render the assessment of the board of education to deny tenure a violation of petitioner's substantive due process rights under the Fourteenth Amendment to the United States Constitution.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The decision of the United States District Court for the District of New Jersey is unreported. The opinion of the District Court is reproduced in petitioners' Appendix (A. 3-13).

The decision of the United States Court of Appeals for the Third Circuit entered on April 16, 1981, by way of judgment order is without opinion. (Docket No. 80-2504, Third Circuit, April 16, 1981). The judgment order of the Third Circuit is reproduced in petitioners' Appendix (A. 1-2).

Jurisdiction

Petitioners seek a review on writ of certiorari and this Court's jurisdiction, pursuant to 28 U.S.C. §1254(1), which provides:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

Jurisdiction before the United States District Court for the parties in the subject matter of the litigation was pursuant to the provisions of 28 U.S.C. §§1343, 2201 and 2202; and 42 U.S.C. §§1983 and 1988; and the First and the Fourteenth Amendments to the United States Constitution.

Counter-Statement of the Case

Respondent, Hawthorne Board of Education, declined to grant tenure to petitioner Markot, a non-tenured teaching staff member at Hawthorne High School. Respondent Board of Education exercised a sixty-day notice of termination provision that is provided in the contract of each non-tenured teaching staff member employed in the school district. The respondent Board exercised its dis-

cretion in denying a tenure appointment to petitioner pursuant to the recommendation of its entire administrative staff on the basis of their assessment of petitioner's teaching performance.

The principal of the high school, respondent Hausner, subsequent to observing the petitioner Markot conducting an English I class for two consecutive days during which the students did nothing but read a novel in class to themselves while the teacher read the same assigned novel in class to herself, deemed this to be less than an adequate performance for the teaching of freshman English. This procedure and methodology described by the petitioner as "silent reading" is contended by the petitioner to be an educational procedure or methodology that petitioner Markot possesses a constitutional right to use in class to whatever extent petitioner desires.

This procedure implemented by petitioner for the entire period of a first-year English class for three consecutive days, in addition to deficiencies in her daily plan book, were the reasons expressed by the three respondent school administrators—principal, vice principal and superintendent of schools—who unanimously urged the denial of a tenure appointment to the petitioner.

The New Jersey Commissioner of Education denied an appeal by the petitioner Markot, concluding that the respondent Board of Education properly exercised discretion in not granting tenure to petitioner. The New Jersey State Board of Education affirmed the decision of the Commissioner indicating that the Board of Education and the Course of Study did not approve the procedure or methodology of "silent reading" as asserted by the petitioner Markot. Petitioner Markot, before this Court and in the trial Court, somewhat obscures the fact that petitioner was a nontenured employee whose services were terminated prior to achieving tenure.

Petitioner Markot asserts a violation of the First and Fourteenth Amendments to the United States Constitution in that her termination prior to her obtaining tenure, or the denial of tenure to her, based on the assessment and recommendations of the entire administrative staff of the Hawthorne Board of Education, is an impermissible intrusion of her freedom of speech and her academic freedom.

In the early part of 1979, the respondent, Hawthorne Board of Education, employed a new principal in the Hawthorne High School. The principal, on February 5, 1979, entered the classroom of the petitioner Markot at the beginning of the period and observed her purportedly teaching an English I class, remaining in the classroom for half the class period from 11:15 A.M. until 11:35 A.M. During the twenty minutes of observation, petitioner Markot sat at the desk reading the book "To Kill a Mockingbird", and the entire class likewise engaged in what petitioner Markot described as "silent reading" of the same novel. During the entire time that the principal observed the class there was no communication between the petitioner Markot and the class, nor were there any worksheets or notebooks on the students' desks.

The principal indicated to the petitioner Markot that what he observed on the 5th day of February, 1979, was not indicative of actual classroom teaching and that there was no purpose to his remaining for what was in his view a study period. The principal stated to petitioner Markot on February 5, 1979, that he would return in the future to observe evidence of an actual teaching performance.

The very next day, February 6, 1979, believing it essential to observe the petitioner Markot in the midst of actual teaching such as a literature discussion, the principal, Dr. Hausner, entered the classroom halfway through the pe-

riod, at 11:30 A.M., and the students were once more silently reading the novel, "To Kill A Mockingbird". Petitioner Markot did not even notice the presence of the principal in the classroom. At the termination of the entire class period, the petitioner Markot finally looked up, noticed the principal seated in the rear of the room, walked toward him and stated that if he, the principal, desired to see a literature lesson he should return in two days or visit one of her other English classes.

The petitioner Markot stated that on February 5, 6 and 7, 1979, her English class for the entire period was engaged in silent reading only and that no other activity involving students took place for three consecutive days.

Petitioner Markot requested a closed hearing with the respondent Hawthorne Board of Education which was held on February 20, 1979, extensive testimony being tendered, and subsequent to deliberation the respondent Hawthorne Board of Education enacted a resolution terminating her employment and denying tenure, based on the recommendation of the entire administrative staff of the Hawthorne High School.

An expert witness testified that a procedure of "silent reading" with many other nuances, is viewed by some educational authorities as a meaningful educational tool. The same expert conceded that other educational sources regard such silent reading as a wasteful use of precious class time, involving an activity that youngsters should be pursuing in study halls, in the library or at home.

The trial Court, pursuant to Federal Rule of Civil Procedure 41(b), granted an involuntary dismissal to all respondents on motion, setting forth detailed findings of fact and conclusions of law, appearing in petitioners' Appendix (A. 3-13).

REASONS FOR DENYING THE WRIT

It is reasonable for a Board of Education to conclude that where an English teacher literally abandons the substantive teaching of English for entire class periods on numerous occasions, during which hiatus both students and the teacher are involved in no other activity except reading to themselves, such conduct is tantamount to converting an English class into a supervised study, a dismal pedagogic performance and most assuredly ample justification for a Board of Education in the exercise of its broad discretion to deny the granting of tenure. Under such circumstances, the assertion that a writ of certiorari be granted by this Court by virtue of an unlawful intrusion into the individual teacher's academic freedom, freedom of speech, due process or any constitutional right is without a semblance of merit.

Respondent, Board of Education, pursuant to the recommendation of its administrative staff, the principal of the high school, vice principal of the high school and the superintendent of schools, exercised its discretion to deny a tenure appointment to the petitioner, Markot. It is undisputed that the administrators' recommendations and the Board's action indicated disillusionment and dissatisfaction with the petitioner's extensive use of what is described by petitioner Markot as "silent reading" in the freshman English I Literature class and the manner in which she maintained her lesson plan book.

This petitioner asserts that she possesses a constitutional right to insist that entire English Literature periods for freshmen shall involve nothing other than students reading to themselves while she, as the teacher, reads to herself and if the Board of Education, in the exercise of its

discretion, acknowledges the recommendation of its administrators and determines this to be an unimpressive teaching performance and denies her the accrual of tenure, such action by the Board of Education and the school administrators is intrusion into her constitutional right of free speech and academic freedom. While §1983 has been a fertile arena for exotic claims, the statute was never intended to foster the absurd. The claim proffered by petitioners clearly falls in that category.

The individual respondents and the respondent, Hawthorne Board of Education, contend that this claim is in fact a trivialization of treasured constitutional liberties. In reality, it is a ruse; and frankly, a blatant attempt to provide a cloak of constitutional protection to pedagogic indolence in the guise of the First Amendment.

It is noteworthy to consider the innumerable deleterious ramifications of petitioners' contentions. For example, if a board of education employs a French teacher and pursuant to the recommendation of a high school principal denies her tenure appointment, stating as a reason that school administrators deemed her pattern of only using cassettes to teach French with virtually no attempt to converse herself in French with the class, such a subjective assessment would represent an unlawful intrusion of academic freedom and freedom of speech and be impermissible. Likewise, a determination by a board not to grant tenure to a science teacher who, in the judgment of school administrators and pursuant to their recommendation concluded that a teacher utilized films to an excessive degree neglecting active laboratory experiments or failed to foster lively class discussions, which the board determined to be less than desirable or an uninspiring teaching performance would be forbidden as an invidious intrusion of free speech and academic freedom. By the same token, a history

teacher might contend and insist through a constitutional shield that her history class will do nothing except read newspapers silently for unlimited portions of a term. The argument of petitioners is not merely unacceptable but strikingly meritless. Such a determination would preclude school administrators and the Board from rendering any value judgments and totally vitiate the discretionary right of a board of education to grant or deny tenure.

It is quite persuasive to consider and recognize what this case does not involve. It is not remotely similar in form or substance to the factual circumstances revealed in the line of decisions that set forth the parameters of First Amendment protection accorded to students, teachers, school personnel and public employees in general. While it is an appropriate generalization that in virtually every Federal Court decision pertaining to First Amendment rights vis-a-vis teacher comments, whether in the classroom or out of the classroom, the crucial issue invariably involves balancing the interest of the State as an employer against the right of free expression by the public employee. Very frequently, there arises the typical setting of bitter public comments by a teacher against a board of education and the necessity for determining whether subsequent action taken by a board of education is or is not in the nature of forbidden retaliation against the protected right of free expression by a teacher as to matters of general public concern. *Gilbertson* v. *McAllister,* 403 F.Supp. 1 (1975). Also somewhat frequently there are charges of a school district acting in the impermissible censure role exceeding either by direct or indirect means to impede the discussion or exchange of controversial subject matters by teachers and students in the classroom or elsewhere. None of these are remotely involved in the instant matter. There is not the slightest suggestion that the Board of Education or the individual respondents acted

in retaliation for what the petitioner Markot expressed in public or private pertaining to a criticism of school board operations, or to the content of class discussion, or what was expressed by the petitioner in the classroom pertaining to an opinion, or in the discussion of a controversial subject matter. Quite to the contrary, there is the undisputed absence of any subtle or hidden motivations. There is no hint of seeking to achieve by indirection that which the Board may not accomplish directly. The content of what this petitioner as a teacher desired to *"think, state or express in or out of the clasroom" is just not at issue.*

It is undisputed that the respondent, Robert N. Hausner, a new principal, arrived on February 1, 1979, with no knowledge even as to the existence of petitioner. The new principal embarked on his statutorily mandated task of observing and evaluating non-tenured personnel which included the petitioner. With no predisposition as to any members of the staff, how could Dr. Hausner, having never known the petitioner, at least until the time of his first observation, be anything but impartial. His visit to petitioner Markot's class on February 5, 1979, in anticipation of observing the teaching of an English I Literature course resulted in Dr. Hausner observing at least in his assessment an English teacher supervising a study period but not teaching her subject matter. Instead of an active English Literature teaching experience, students were doing nothing other than reading to themselves while the teacher read to herself, which activity continued into the next day (in fact, admitted by the petitioner to be the sole activity for three consecutive days). This led to Dr. Hausner's assessment and judgment that at the very least this was neither desirable or a satisfactory teaching performance by the petitioner. This coupled with petitioner's indication that this extensive silent reading activity had been pursued because there had been a "shortage of books",

which statement at best was deliberately misleading, and at worst a patent falsehood, together with the further assertion that silent reading was utilized because there was a wide discrepancy in the reading abilities of the students, which was also completely inaccurate, indicates beyond question that freedom of expression or academic freedom is a subject matter that is not involved in this case in any shape or form. It is a bogus issue and no tortured manipulation of the facts can infuse vitality into this specious assertion.

Surely, it is an appropriate and reasonable determination by a high school principal to observe an English teacher and render both an objective and subjective analysis as to her style, her presentation of a subject matter to a class, and her ability to inspire student interest, which must be acknowledged as legitimate factors that a principal as an evaluator may appropriately utilize in determining whether tenure should be recommended. In fact, this is and was Dr. Hausner's duty. It is also apparent that no matter what variations of the facts are considered in the instant matter, that is, whether silent reading was utilized for one-half of the period, for the whole period, for a substantial part of the period, or whatever modified version, it is an intellectual mockery to suggest that a board of education commits a constitutional intrusion when it concludes, pursuant to the recommendation of its administrative staff, that such silent reading reflects an inadequate teaching performance.

In *Clark* v. *Holmes,* 474 F.2d 928 (1972), a non-tenured teacher was denied a tenure appointment and in filing a §1983 action concluded that administrators and the university penalized him from exercising his right to freedom of speech. The factual setting indicated that plaintiff Clark had counseled an excessive number of students

instead of referring them to the university's professional counselors, overemphasized sex in his health survey course, counseled students with his office door closed and belittled other staff members in discussions with students. The Court made the following observation as to his claim of First Amendment intrusion, stating:

> "First, Clark construes too broadly the extent of his First Amendment rights and thus slights the interest of the State in providing its educational services according to policies it deems proper. Clark would have us drastically and radically curtail the scope of discretion which may be exercised by a state school in deciding whom it shall rehire. Second, Clark ignores the factual differences between his case and a case like *Pickering. His disputes with his superiors and colleagues about course content and counselling were not 'matters of public concern' and involved Clark as a teacher rather than as an interested citizen. Compare also* Perry v. Sindermann, 408 U.S. 593, 595, 598, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972). Further, Clark has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members as to the proper content of the required health course *and the inadvisability of engaging in extensive personal counselling of students, two of the three matters about which most of the defendants were particularly concerned.*
>
> The same reasoning applies to Clark's criticisms of NIU's administration and faculty in front of students. We think the district court correctly decided that this conduct also was not protected by

the First Amendment. *Pickering, which guards a public school teacher's right to speak out publicly on issues of public concern, is factually distinguishable from the present case.* However, we do recognize that, although academic freedom is not one of the enumerated rights of the First Amendment, Parducci v. Rutland, 316 F.Supp. 352, 355 (M.D. Ala. 1970), it is now clear that academic freedom, the preservation of the classroom as a 'market place of ideas,' is one of the safeguarded rights. Healy v. James, 408 U.S. 169, 180-181, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Healy, supra. The plaintiff here irresponsibly made captious remarks to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations. See* Ferguson v. Thomas, 430 F.2d 852, 858 (5th Cir. 1970).

Furthermore, *Pickering suggests that certain legitimate interests* of the State may limit a teacher's right to say what he pleases: for example, (1) *the need to maintain discipline or harmony among co-workers;* (2) the need for confidentiality; (3) *the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties;* and (4) the need to encourage a close and personal relationship between the employee and his

> superiors, where that relationship calls for loyalty and confidence." (p. 931) (emphasis added)

In *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct 1731, 20 L.Ed.2d 811 (1968), in which the Supreme Court held public criticism of board action by a teacher which could at the most tangentially and insubstantially be related to his employment is on balance a protected activity for which a board may not impose retaliatory measures. In the instant matter, no matter what variation or version of the facts is presumed, the balancing test pronounced in *Pickering, supra,* and applied in *Clark, supra,* and in virtually every other ensuing Federal decision, is not needed. There is no need to balance one interest as against the other because unquestionably there has been no intrusion of this petitioner's freedom of expression or speech.

This is poignantly illustrated in Dr. Hausner's testimony as he described petitioner Markot's teaching performance during his evaluation:

> "Q. Dr. Hausner, if my memory serves me correctly your observations on February 5th and 6th, and I think you said one or two other meetings with Miss Markot, at any of those times when you've talked to her, and any time did you say, 'Miss Markot, I do not want you to say something'?
>
> A. No.
>
> Q. Now, you look puzzled when you responded to that. Why do you say, "no"?
>
> A. Why should I have told Miss Markot not to say anything?
>
> Q. Did you tell her anything with respect to anything she said in class, that you want her to cease saying whatever she was saying in class?

A. *The point is that she didn't say anything in class.*

Q. So—

A. I would have welcomed the opportunity for Miss Markot to communicate with her classes. Indeed, this is a primary responsibility of an English teacher, to interact with pupils, to hold a meaningful discussion, to enable students to interact with each other. To respond to student questions. To participate in a meaningful discussion and activity. None of these things were going on. *The class was engaged in total silence on two occasions.*

Q. Now, Dr. Hausner, you say you didn't tell her not to say anything. On the other side of the fence, did you say, Miss Markot, I want you to say so-and-so and so-and-so and so-and-so, and not discuss any type of subject matters or indicate to her anything that she should say in class?

A. The only thing that was said to Miss Markot on February 5th was that 'I would expect to see a discussion take place the next time I come into your classroom.'

Q. Nothing about the content?

A. No, not how to teach it. No."

While the doctrine of academic freedom has been formulated, see *Healy* v. *James,* 408 U.S. 169 (1972), it is not conceivable that it has been extended to protect activity involved in this dispute—the right of a teacher to insist the teacher has a constitutional right to conduct a classroom with students doing nothing but reading to themselves. In *Hetrick* v. *Martin,* 480 F.2d 705 (6th Cir. 1973) cert. den., 414 U.S. 1075, the Sixth Circuit sustained that a state university could insist that a teacher implement stressing the fundamentals and to teach on

a basic level, claiming that the First Amendment "does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors." *Hetrick, supra,* at 709.

Also, in *Ahern* v. *Board of Education of School District of Grand Island,* 456 F.2d 399 (7th Cir. 1972), a high school teacher was directed to adhere to the subject matter of the course and to utilize conventional teaching methods. Dismissal of Ahern was held by the Court affirming that a teacher has no right to teach her course in a method that contravened the wishes of her employers, with the implicit recognition by the Court that same did not intrude on the free flow of ideas. *Keefe* v. *Geanakos,* 418 F.2d 359 (1st Cir. 1969), and *Parducci* v. *Rutland,* 316 F.Supp. 352 (M.D. Ala. 1970), together with host of other cases, enabled teachers to distribute scholarly and artistic literature even though the decisions involved offensive language. The right to present controversial films and articles about race relations was also cited to be protected activity in *Sterzing* v. *Fort Bend Independent School District,* 376 F.Supp. 657 (S.D. Texas 1972), remanded on other grounds, 496 F.2d 92 (5th Cir. 1974). It is inconceivable that petitioners cite these decisions and a deluge of others with the contention that a classroom teacher has the constitutional right to remain silent in the classroom and insist that her subject matter be achieved by students doing nothing other than reading to themselves.

The common thread of the above "academic freedom" cases is the concept that teachers may not be restricted in efforts to stimulate vigorous, free-flowing debate in their classrooms. It is essentially to assure precisely that which Dr. Hausner described in rendering his evaluation, that is, a lively, energetic discussion. It is towards such an end

that the dissemination of materials, even though on controversial subject matters so long as it possesses sound educational value, should not be precluded.

Petitioners persist in deluging the Court with decision after decision, whether expressed in the guise of "academic freedom" or the "freedom of expression" argument, that involve the activity of a board of education acting as a censor to stifle ideas. That issue is just not involved in the instant matter.

The argument that the individual respondent administrators in the Hawthorne School District and the respondent Hawthorne Board of Education by regarding petitioner's use of "silent reading" as less than an admirable attribute in teaching English Literature and frankly, an indication of basic laziness, is a determination that this Court must prohibit because it comprises an impermissible intrusion into petitioner's freedom of speech and academic expression cannot conceivably rise to the level of a bona fide constitutional contention. The trial Court correctly deemed that petitioners were unable to demonstrate that any constitutionally protected activity might conceivably be deemed as a notivating factor in the Board's decision to terminate her employment. See *Mt. Healthy Board of Education* v. *Doyle,* 429 U.S. 274 (1977).

There exists no sharp conflict among the United States Circuit Courts involving recognition of a Federal cause of action based upon the right of academic freedom under the First and Fourteenth Amendments of the Constitution as it relates to utilizing a particular reasonable teaching methodology which requires resolution by the Supreme Court of the United States.

It is asserted that the decision of the Third Circuit Court of Appeals has now created a glaring lack of uniformity throughout the Federal system in which most circuits recognize the existence of a Federal cause of action extending to protect the use of reasonable teaching methodology, while others do not. This assertion is unsupportable and despite the redundant recital of cases alleged to support such a contention, there is not a single decision of a Federal District Court or a Circuit Court that remotely resembles the facts involved in the instant matter.

The decisions in every instance on close scrutiny involve only methodology that is inseparable from expression. There is always involved a determination by the Court that a board is attempting to stifle, squash or control the free expression of concepts and ideas. Petitioners cite *Wilson* v. *Chancellor*, 418 F.Supp. 1358 (D. Ore. 1976), which recognizes the act of teaching to be a form of expression and descriptions of methods being used in teaching as media. In *Wilson, supra,* however, the board attempted to restrict the use of political speakers which was tantamount to suppressing free expression. Likewise, reliance is placed by petitioners on *Sterzing* v. *Fort Bend Independent School Dist.*, 376 F.Supp. 657 (S.D. Tex. 1972), which again, although talking in terms of methodology, involves the content of the media utilized with the Court holding that the use of controversial films about race relations and controversial articles were protected activities

and that school boards may not stifle expression. Petitioners can cite no case in support of the ineffable assertion involved in the instant matter, and that is, the unimpeded right of a teacher to insist "I want to indulge in complete silence, letting students read to themselves and do absolutely nothing else in class" and should a public school district regard this as a dismal pedagogic performance and not grant tenure this is a fatal intrusion of her constitutional rights.

To contend that the language of various circuits throughout the United States plucked out of context supports this contention is pure sophistry. To convert the instances where the courts have deemed methodolgy such as the use of public speakers and written materials to be so inextricably intertwined with freedom of expression or the content of speech into a constitutional right of a teacher to remain silent and do nothing other than read to herself in class while her students read to themselves because this is her methodology of teaching is sheer nonsense.

In *East Hartford Education Association* v. *Board of Education*, 562 F.2d 838 (1977) the Court indicates that one must be on guard to this clear danger of entertaining unrealistic, tenuous and convoluted claims to First Amendment intrusions, particularly in public education, with the astute observation that:

> "Because teaching is by definition an expressive activity, virtually every decision made by school authorities would raise First Amendment issues calling for federal court intervention." *Id.* at 589.

Federal Courts should be ever vigilant to avoid being immersed in resolution of conflicts that arise in the daily operation of school systems. Deviation from this pattern should occur only when actual, not feigned constitutional intrusions are evident.

Epperson v. *Arkansas,* 393 U.S. 97, 104, 21 L.Ed.2d 228, 234, 89 S.Ct. 266 (1968), set forth in cogent language the guidelines pertaining to Federal judicial intrusion into the operation of the public school system, stating:

> "Judicial interposition in the operation of the public school system of the Nation *raises problems requiring care and restraint.* Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. *By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.*" (emphasis added)

The Supreme Court reiterated and expounded on this principle in *Wood* v. *Strickland,* 420 U.S. 308, 326, 43 L.Ed.2d 214, 227, 95 S.Ct. 992 (1975), again stating:

> "• • • It is not the role of the federal courts to set aside decisions of school administrators which the court may view *as lacking a basis in wisdom or compassion.* • • • The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and §*1983* was *not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.* See Epperson v. Arkansas, 393 US 97, 104, 21 L.Ed.2d 228, 89 S.Ct. 226 (1968); Tinker, supra, at 507, 21 L.Ed.2d 731." (emphasis added)

Is it not evident that clearly the instant case presents a factual setting to which the guiding principles prescribed by the Supreme Court of the United States may be applied with ease. Exercise of discretion by a board of education rendered pursuant to the rational judgment of professional educators that the extensive use of such a teaching methodology is not an impressive or desirable teaching attribute and while it may be tolerated or even advocated by some educational experts it is not what Hawthorne desires, and surely it is within the prerogative of the Board of Education to determine.

A board of education should possess the right to deny tenure to the teacher of any subject matter considering the opinion and observation of school administrators that students have not become involved in extensive discussions, that a class appears to be monotonous or that the style of the teacher in lecturing or otherwise fosters minimal enthusiam. This and numerous similar illustrations fall into the category of legitimate value judgments and the exercise of reasonable discretion by a board of education. The simple point is that the Court's role is not to decide educational policies or to pass on what is the proper exercise of discretion that falls within the framework of educational policies. The function of the Court is only to intrude where on balance there is a blatant, clear violation of freedom of expression, association or other constitutional liberties.

The Court in *East Hartford, supra,* states that neither allegations of free speech nor academic freedom should override the discretion of a board of education to impose a dress code on its teachers. In *East Hartford, supra,* the Court further noted it should only intervene in school matters when a board has strayed outside the area committed to its discretion. The individual respondents and the respondent Hawthorne Board of Education have not

strayed outside the area committed to their discretion in determining from an educational viewpoint that extensive use of silent reading instead of active teaching of English Literature is a legitimate consideration in determining whether the property right of tenure shall be granted to the petitioner.

In *Hetrick* v. *Martin,* 480 F.2d 705, cert. den. 414 U.S. 1075, 38 L.Ed.2d 482, 94 S.Ct. 592, it was determined that academic freedom does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determined whether she had merited tenure status merely because her methods and philosophy are considered acceptable somewhere within the teaching profession, and administration of the public school may, *consistent with the First Amendment,* fail to renew non-tenured teachers because of displeasure with her "pedagogical attitudes", teaching methods, and philosophy of education.

This is consistent with the undoubted right of the State and local board of education within limits set by the State to prescribe the curriculum for its public schools. *Epperson* v. *Arkansas,* at 236. The trial Court properly recognized that the canned testimony of educational expert, Dr. Diskin, espousing the attributes of silent reading should not be permitted to erode the discretion that appropriately reposes with the Board of Education.

No federal court has expressed more eloquently the need to be aware of the genuine danger of extending credence to feigned, tenuous allegations of constitutional deprivations such as appears in the instant case than our own Third Circuit. In *Zeller* v. *Donegal School District Bd. of Education,* 517 F.2d 600 (1975), after holding that a hair length regulation for athletic participation rendered by a school district does not justify a claim for constitu-

tional intrusion, the Court elaborated on the general subject matter of discretion as to regulations and operation of the school district, stating:

> "In summary, there are areas of state school regulation in which the federal courts should not intrude. Without attempting to survey a bright line between permissible and impermissible intervention, we conclude that student hair cases fall on the side where the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's. We decline to cast our conclusion in the form of a neat, stylized lable—to pitch our decision into the jurisprudential pigeonhole of abstention. We merely hold, as a matter of policy and in the absence of 'general' and 'transcending' reasons to the contrary, that the asserted claim is not one for which relief can be granted in a federal forum.
>
> Having made a policy determination, it is important to underscore why we have drawn the line we have. In full recognition of the duty of federal courts to be hospitable, we have ruled deliberately. We have acted because of a felt concern that the sturdy tree of the federal judiciary is in need of pruning if it is to remain strong and stand tall, protecting basic individual liberties against unconstitutional impingements. We are concerned that, if the trimming process does not begin somewhere, the tree may topple of its own weight; that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of 'trivialization' of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and

liberties may be compromised, and the protections accorded those rights and liberties threatened.

'We must never forget,' in Justice Marshall's powerful phrase, 'that it is a *constitution* we are expounding.' If it is to be a document not stating 'rules for the passing hour, but principles for an expanding future', *we must not permit it to be seized upon in wholesale fashion, recklessly or indiscriminately.* Otherwise, in every case where the defendant has acted under color of state law, the visible rules and principles of traditional disciplines of state law may be discarded for comparatively imprecise, newly-formed dimensions of the Fourteenth Amendment's 'due process' and 'liberty' concepts. Predictability and reckonability of societal regulations will lessen, and order and regularity of the law will suffer." (emphasis added)

The claim of this petitioner is a striking illustration of the concern expressed in *Zeller, supra.* The claim at best is an exotic concept of an imagined constitutional deprivation which dilutes and trivializes the First Amendment concept. This Third Circuit Court of Appeals and the Federal District Courts within the Third Circuit provide no succor to the position of petitioners. *Aumiller* v. *University of Delaware,* 434 F.Supp. 1273 (D.Del. 1977) stated the University school administration could not discharge a non-tenured lecturer as a result of statements made by him on the subject of homosexuality. To the same effect is *Eckerd* v. *Indian River School District,* 475 F.Supp. 1350 (D.Del. 1979), which refused to permit the discharge of a tenured teacher as a result of comments in the classroom which were deemed not to intrude in his performance or capacity as a teacher.

To conclude the individual respondents or the respondent, Hawthorne Board of Education, intruded on the constitutional rights of this petitioner by performing their public duty to evaluate and assess the efficacy of her teaching methods and philosophy of education would reduce the discretion of a local school board to the level of an apparition. It would furthermore immerse the federal courts in the day-to-day operation of the public school system and convert the federal judiciary into a source for the correction of errors in the exercise of discretion irrespective of any actual nexus to constitutional violations.

Petitioner Markot, despite flooding her Brief with a seemingly endless number of citations, has yet to proffer a single decision that remotely supports her position that a striking conflict exists between circuits. A review of the cases cited by petitioner disclose that a minimal number involve non-tenured personnel, but more significantly, in virtually every instance concern a factual setting of school districts, either in the role of censoring materials utilized by both tenured and non-tenured teachers stemming from asserted obscenities or salacious materials, or seeking to stifle the discussion of controversial subject matters in the community. Respondents have heretofore stated and are constrained to reiterate by virtue of the argument proffered by petitioners that freedom of expression or academic freedom, whether asserted to be violated in the guise or deprivation of liberty and property or substantive due process or any other conceivable constitutional notion are just not involved in the instant case. No one sought to tell or forbid the petitioner Markot what to say. It is the contention of the respondent Board that at the very least a board of education possesses the discretion to conclude that an English teacher should not be granted tenure when her class-

room performance reflects that instead of active teaching she is conducting a class in a fashion tantamount to a study period in which students do nothing except read to themselves while she reads to herself. Under such circumstances, when a board of education denies a tenure appointment to a teacher and then only after a full hearing, it has complied with every conceivable requirement of procedural and substantive due process.

A writ of certiorari is not warranted on a theory that there exists a severe dichotomy between the lower federal courts or between the various circuit courts of appeal. It is respectfully submitted that the decisions of the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit are correct and presents no sharp constitutional conflict with other circuits in the federal judiciary.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court deny the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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